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# THE RESPONSIBILITY OF INTERMEDIARIES IN AUSTRALIAN COPYRIGHT LAW

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Over the last decade, strategy has shifted.

There is now a sustained global effort to require general purpose intermediaries to exercise control over their networks.

This is a big shift for common law countries: it decouples responsibility from liability.



Do, ho, haul together,  
hoist the colors high.  
Heave ho, thieves  
and beggars, never  
say we die.

**THERE ARE RISKS IN ENLISTING  
INTERMEDIARIES IN THE COPYRIGHT WARS**





Achieved through litigation in Ireland  
By statute in France, New Zealand, South Korea  
By industry agreement in United States and Australia

**GRADUATED RESPONSE HAS NOT WORKED**

### ROADSHOW V IINET

- ▶ Australian liability based on 'authorisation'
- ▶ Defined in UNSW v Moorhouse as 'sanction, approve, countenance'
- ▶ High Court in iiNet warned against extending liability where there is no effective control.
- ▶ Australian law uses three factors:
  - ▶ (A) power to prevent: iiNet was not in a position to control what its users did online
  - ▶ (B) relationship: iiNet did not directly benefit from infringement
  - ▶ (C) reasonable steps: it was unreasonable to expect iiNet to disconnect subscribers based on mere allegations of infringement

# NEGOTIATED COPYRIGHT CODE

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- ▶ After iiNet, rightsholders pushed to legislatively overturn the High Court's decision.
- ▶ Proposals met with strong opposition; Government instead asked for an industry agreement.
- ▶ Similar to US Copyright Alert System
- ▶ But no agreement could be reached about who should pay for the system.

### COSTS AND QUALITY OF NOTICES


- ▶ As we have seen in other schemes, where senders do not bear the costs, they have a strong incentive to send a massive volume of notices.
- ▶ As quantity increases, the risks posed by incorrect and fraudulent notices increases.
- ▶ If ISPs have to bear the costs, they will do less quality control (Best estimates are \$25 - \$100 per notice)
- ▶ Rightsholders have not been willing to use schemes where they pay costs (e.g. NZ). Question whether benefits outweigh costs?
- ▶ There is no compelling reason that either taxpayers or internet subscribers should bear the costs of enforcement of private rights.

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# GRADUATED RESPONSE

- ▶ There are important basic human rights at stake
- ▶ Right to freedom of expression, access to information.
- ▶ Termination schemes are a very severe, very blunt punishment. They are unlikely to be proportionate. See Suzor & Fitzgerald: <http://eprints.qut.edu.au/43926/>
- ▶ They are also unlikely to be effective. See Giblin, Evaluating Graduated Response: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2322516](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322516)
- ▶ Any scheme should be purely educative.



A man with a mustache, wearing a light-colored cowboy hat and dark sunglasses, is looking towards the camera. He is wearing a light blue and white plaid shirt. He is standing next to a green car with its hood open. In the background, there are other cars and a building with large windows.

Rightsholders increasingly seek to require Internet Service Providers to disclose contact details of subscribers alleged to have infringed copyright.

For major rightsholders, this is primarily educative.  
For some rightsholders, this is designed to raise revenue.

# PRELIMINARY DISCOVERY AND 'SPECULATIVE INVOICING'

# A BRIEF HISTORY OF SPECULATIVE INVOICING

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- ▶ Started with RIAA filing suits against 30,000+ defendants. Many were settled for \$3,000 - \$12,000.
- ▶ These suits resulted in very bad publicity rightsholders.
- ▶ Major rightsholders committed to stop suing individuals.
- ▶ Smaller rightsholders realized a business opportunity. Particularly adult entertainment industry, but also independent film producers.
- ▶ Processes have been criticised as 'extortion' and Abuse of process by courts around the world (*Media Prods. Inc. v. John Does 1-26*, No. 12-CV-31719, 2012 WL 3866492 [2]; *Golden Eye* [2012] EWHC 723 ).

## DALLAS BUYERS CLUB LLC V IINET LIMITED (2015) FCA 317

- ▶ Voltage sent 4000+ allegations of infringement to Australian ISPs and sought preliminary discovery
- ▶ By this time, Voltage had a reputation as a bad faith actor (see e.g. *Voltage v Doe* [2014] FC 161)
- ▶ Court ruled that discovery was permissible,
- ▶ but must be supervised by the Court.
- ▶ Discovery could only be used to genuinely progress litigation.


## DALLAS BUYERS CLUB LLC V IINET LIMITED (2015) FCA 317

- ▶ Voltage sought four heads of damage in draft letters:
- ▶ 1. Compensation for costs of copy of film
- ▶ 2. A worldwide 'licence fee' to allow subscribers to distribute film via BitTorrent
- ▶ 3. A punitive amount based on infringement of third party rights
- ▶ 4. Costs of identifying the respondent
- ▶ Court held only 1 and 4 were legitimate.

## DALLAS BUYERS CLUB LLC V IINET LIMITED (2015) FCA 317

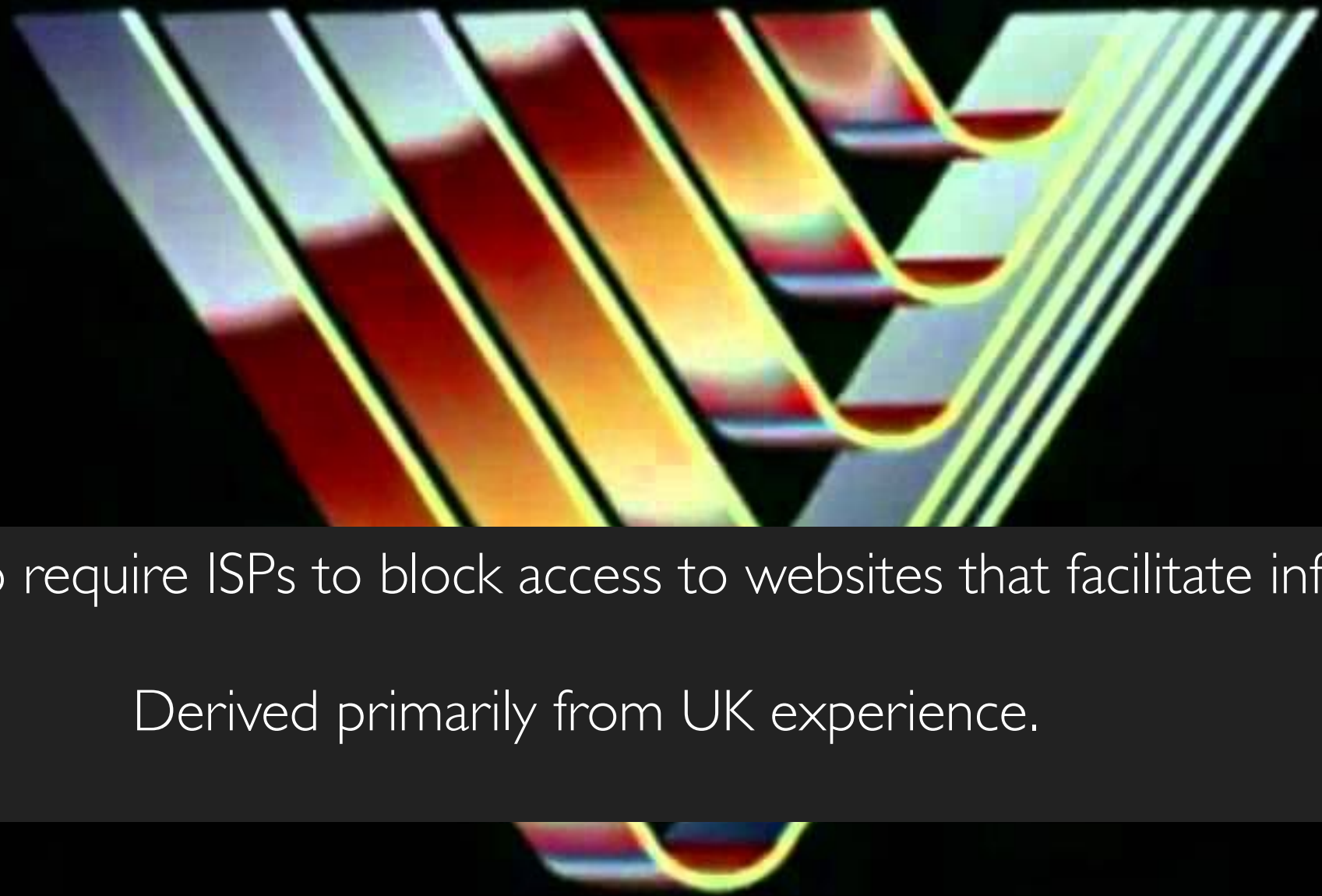
- ▶ Licence fee claim was "so surreal as not to be taken seriously"
- ▶ Voltage provided no indication of how it would calculate a punitive claim.



A man with a mustache, wearing a light-colored cowboy hat and aviator sunglasses, is leaning against the open hood of a green classic car. He is wearing a light blue and white plaid shirt. The background shows a blurred outdoor setting with other cars and people, suggesting a car show or a similar event. The lighting is bright, indicating it's daytime.

Court supervision is **vital**.  
Major rightsholders are unlikely to abuse the process.  
But unscrupulous rightsholders will act as aggressively as they are permitted.

# PRELIMINARY DISCOVERY



A global effort to require ISPs to block access to websites that facilitate infringement.

Derived primarily from UK experience.

# WEBSITE BLOCKING



The image is a collage of four screenshots related to the Newzbin website and its client:

- Top Left:** A browser window showing an "Error - site blocked" message for the URL `www.newzbin.com`.
- Top Right:** A screenshot of the Newzbin website's navigation bar and a sidebar menu. The navigation bar includes links for Home, News, Browse, Search, and My Account. The sidebar menu lists categories: Everything, Unknown, Anime, Apps, and Books.
- Bottom Left:** A screenshot of the "About Newzbin Client" dialog box. It contains the text: "This tools serves the purpose of enabling an uninterrupted enjoyment of the Newzbin services." and "Copyright (c) 2011, Newzbin. All Rights Reserved." with an "OK" button.
- Bottom Right:** A screenshot of the Newzbin website's "Movies" category page. It shows search results for "Piranha 3D (2010)" and "Bad Lieutenant (2009)". The first result is "Piranha 3D (2010)" with a size of 27,326.4MB and a post age of 9 hours. The second result is "Bad Lieutenant (2009)" with a post age of 17 days.

WEBSITE BLOCKING IS  
NOT VERY EFFECTIVE

# WEBSITE BLOCKING

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- ▶ Blocking an entire URL or IP address is a very blunt approach:
- ▶ "an extreme measure—analogous to banning a newspaper or broadcaster—which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse." (Joint Declaration on Freedom of Expression and the Internet, <http://www.osce.org/fom/78309>)
- ▶ Due process is very important. Rights to be heard and to appeal.
- ▶ Also very important technical questions (IP address, URL filtering, ongoing obligations ...?)
- ▶ Given the limited evidence about effectiveness, website blocking is unlikely to be a **proportionate** measure.

# MANILA PRINCIPLES

## ON INTERMEDIARY LIABILITY



### INTRO

All communication over the Internet is facilitated by intermediaries such as Internet access providers, social networks, and search engines. The policies governing the legal liability of intermediaries for the content of these communications have an impact on users' rights, including freedom of expression, freedom of association and the right to privacy.

With the aim of protecting freedom of expression and creating an enabling environment for innovation, which balances the needs of governments and other stakeholders, civil society groups from around the world have come together to propose this framework of baseline safeguards and best practices. These are based on international human rights instruments and other international legal frameworks.

[READ MORE](#)

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**Intermediaries should be shielded by law from liability for third-party content**



# THERE ARE IMPORTANT LIMITS TO INTERMEDIARY LIABILITY



# MANILA PRINCIPLES ON INTERMEDIARY LIABILITY

- ▶ 1. Intermediaries should be shielded by law from liability for third-party content
- ▶ 2. Content must not be required to be restricted without an order by a judicial authority
- ▶ 3. Requests for restrictions of content must be clear, be unambiguous, and follow due process
- ▶ 4. Laws and content restriction orders and practices must comply with the tests of necessity and proportionality
- ▶ 5. Laws and content restriction policies and practices must respect due process
- ▶ 6. Transparency and accountability must be built into laws and content restriction policies and practices

**SAFE HARBOURS ARE  
VERY IMPORTANT**





# CERTAINTY IS IMPORTANT FOR INVESTMENT IN INNOVATIVE TECHNOLOGIES

- ▶ Australia does not have effective safe harbours; this discourages investment and innovation.
  - ▶ (Examples from both copyright and defamation law)
  - ▶ <http://digital.org.au/content/24-organisations-publish-open-letter-essential-copyright-reforms>
- ▶ Legal risks and challenges for developers of new technologies

## Granting of requests

218,320

The total number of requests made to Google, up to March 2015

Most requests are for private personal information



Nearly half of private personal requests have been granted...



... and so nearly half of all requests have been granted



PRIVATE COMPANIES  
CANNOT EASILY MAKE  
DECISIONS OF LAW

**A WELL FUNCTIONING  
MARKET IS KEY TO  
STOPPING INFRINGEMENT.**



**ONLY FAIR COPYRIGHT  
LAWS WILL BE  
RESPECTED.**



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